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U.S. Department of Justice

Environment and Natural Resources Division

DJ#90-11-2-1109

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June 10, 1998

VIA TELEFACSIMILE ONLY

TO: Attached Counsel List

Re: United States v. City of Albion, Michigan, et al., Civil
No. 1:97CV1037 (W.D. Mich.) - Draft Joint Status Report.

Dear Counsel:

Attached is a draft Joint Status Report reflecting our discussions by telephone yesterday. Please review and comment and provide any additional material, including the respective parties' Statement of the Case language, before COB, Monday, June 15, 1998. I will fax the revised penultimate version to you for your final approval by COB, Monday, June 15, 1998. Also, as I read the Court's Order, the Joint Status Report must be approved and signed by all counsel and filed with the Clerk of Court by Friday, June 19, 1998.

With respect to signing and filing the Joint Status Report, I suggest that I send the final approved version to Mike Caldwell for signature by overnight mail, who in turn would sign it and send the document to either Melvin Moseley or Charles Denton in Grand Rapids, and request that either of the latter two counsel, after signing, deliver the document to the other, and then to the Clerk's office for filing by June 19, 1998. Please let me know if this arrangement is satisfactory.

I look forward to receiving your comments and additional material for the Joint Status Report. I can be reached by telephone at (202)616-6552 and by fax at (202)616-6584. Thank you for your cooperation and assistance. If there are any questions, please do not hesitate to call.

Sincerely,

Francis J. Biros
Francis J. Biros
Trial Attorney

Environment and Natural Resources
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	Case No. 1:97-CV-1037
v.)	
)	Hon. David W. McKeague
CITY OF ALBION, MICHIGAN,)	
Defendant/Third-Party)	Mag. J. Joseph G. Scoville
Plaintiff,)	
)	
v.)	
)	
COOPER INDUSTRIES, INC. and)	
CORNING, INCORPORATED,)	
Third-Party Defendants,)	
Counterclaimants and)	
Third-Party Plaintiffs,)	
)	
v.)	
)	
DECKER MANUFACTURING)	
CORPORATION,)	
Third-Party Defendant,)	
Counterclaimant)	
and Crossclaimant.)	
)	

JOINT STATUS REPORT

A Rule 16 Scheduling Conference is scheduled for Wednesday,
June 24, 1998 - 11:00 a.m. Appearing for the parties as counsel
will be:

Counsel for United States of America:

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Counsel for the parties conferred by telephone on June 9, 1998 pursuant to the Court's order and Fed. R. Civ. P. 26(f), to discuss the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, the formulation of a discovery plan, and the herein-discussed topics.

The parties propose that the litigation be phased in the interests of facilitating the Court's case management and conserving the parties' and the Court's time and resources. Phase I of the litigation encompasses liability issues of Defendant City of Albion ("Albion") and Third-Party Defendants,

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Cooper Industries, Inc. ("Cooper"), Corning, Inc. ("Corning") and Decker Manufacturing Corp. ("Decker"). Phase II encompasses issues relating to response costs, damages, penalties and allocation of contribution among Defendant and Third-Party Defendants. This Joint Status Report's proposed scheduling is based on this phased litigation approach. The parties request that the Court convene a Rule 16 Scheduling Conference upon adjudication of the liability issues in Phase I to address refinements to the Case Management Order necessary to address Phase II.

1. Jurisdiction:

The United States alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1311, 1345 and 1355 and Sections 107(a), 106(a) and 113(b) of the Comprehensive Environmental response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9607(a), 9606(a) and 9613(b). Defendant Albion, in its answer, has neither admitted nor denied that the court has jurisdiction under these statutes, and further, reserves its objections to the Court's jurisdiction based upon the doctrine of sovereign immunity under the 11th Amendment.

Albion, in its Third-Party Complaint against Cooper and

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Corning, alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1331, 1337 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction. Cooper and Corning do not object to Albion's jurisdictional assertions. Moreover, in their Counterclaim against Albion, as well as their Third-Party Complaint against Decker, Cooper and Corning also allege that the basis for the Court's jurisdiction over their Counterclaim is 28 U.S.C. §§ 1331 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction. In its Counterclaim against Cooper and Corning, and in its Crossclaim against Albion, Decker also alleges that the basis for the Court's jurisdiction is 28 U.S.C. §§ 1331 and 1367 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and the doctrines of pendent and ancillary jurisdiction. Albion raised 11th Amendment sovereign immunity objections to Decker's Crossclaim.

2. Jury or Non-Jury:

Albion has filed a Jury Demand pursuant to Fed. R. Civ. P. 38 on all causes of action so triable as of right, and as to any causes not so triable as of right, Albion requests that an advisory jury be impaneled by the Court pursuant to Fed. R. Civ.

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P. 38(c). The United States opposes Albion's Jury Demand and advisory jury request, and requests trial by the Court on all issues of law and fact affecting the United States' claims. Decker also has demanded a trial by jury in connection with claims asserted against Decker by Cooper and Corning in their Third-Party Complaint.

3. Judicial Availability:

The parties do not agree to have their case tried by a Magistrate Judge if the case proceeds to trial.

4. Geographic Transfer:

The parties agree that a transfer for geographic convenience is not warranted in this case.

5. Statement of the Case:

The United States filed this action against Albion pursuant to Sections 106(b), 107(a), and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9606(b), 9607(a), and 9613(g)(2). In its first claim for relief, the United States seeks, under Section 107(a) of CERCLA, recovery of unreimbursed past costs incurred in connection with response actions by the U.S. EPA at the Albion-Sheridan Township Landfill Superfund Site located at 29975 East Erie Road in Sheridan Township, Calhoun County, Michigan (the "Site") and

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other response costs at the Site. The United States alleges that Albion is liable under Section 107(a)(2) as the operator of the Site at the time of disposal of the hazardous substances. The United States also seeks a declaratory judgment under 42 U.S.C. § 9613(g)(2), against the Albion for future response costs to be incurred by U.S. EPA in connection with the Site.

In its second claim for relief, the United States seeks civil penalties under Section 106(b) for violation of a Unilateral Administrative Order, Docket No. V-W-96-C-316, issued on October 11, 1995 by U.S. EPA under Section 106(a) to four potentially responsible parties ("PRPs"), including Albion, to conduct response actions at the Site. This claim is asserted against Albion for its alleged refusal to comply with the Unilateral Administrative Order.

Albion

Cooper and Corning

Decker

6. Pendent State Claims:

The Third-Party actions in this case include claims for recovery of past and future response costs and contribution, raised under the Michigan Natural Resources and Environmental

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Protection Act ("NREPA"), M.C.L. §§ 324.20101 et seq., Michigan Contribution Between Joint Tortfeasors Act, M.C.L. §§ 600.2925(a) et seq., and common law principles of contribution.

7. Joinder of Parties and Amendment of Pleadings:

The parties expect to file all motions for joinder of parties to this action, if any, and to file all motions to amend the pleadings, if any, by August 24, 1998, sixty (60) days following the Rule 16 Scheduling Conference.

8. Disclosures and Exchanges:

(i) The parties have initiated discovery in this case and have advanced beyond the desirability for the initial disclosures delineated in Fed. R. Civ. P. 26(a)(1). Thus, the parties believe that disclosures pursuant to Rule 26(a)(1), and associated schedules for such disclosures, are unnecessary.

(ii) The United States expects to exchange the names of known fact witnesses by October 24, 1998, and expert witnesses by November 24, 1998, 120 days and 150 days respectively, after the Court's scheduling conference of June 24, 1998. Albion expects to exchange the names of known fact witnesses by November 24, 1998, and December 24, 1998, 150 days and 180 days respectively, after the Court's scheduling conference of June 24, 1998. The

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remaining parties expect to exchange the names of their known fact witnesses by December 24, 1998, and expert witnesses by January 24, 199⁹~~8~~, 180 days and 210 days respectively, after the Court's scheduling conference of June 24, 1998.

(iii) The parties agree that it would be advisable to exchange expert witness reports pursuant to Fed. R. Civ. P. 26(a)(2), and propose to exchange expert witness reports thirty (30) days after the date of the disclosure of expert witnesses by each party according to the schedule in the preceding paragraph.

(iv) The parties have initiated discovery in the case and are making available documents pursuant to document production requests at this time. Therefore, a schedule for making available documents without the need for a formal request for production is unnecessary.

9. Discovery:

The parties believe, at this time, that Phase I liability discovery proceedings can be completed by March 24, 1998, 270 days following the Rule 16 Scheduling Conference. The parties recognize that there may be some overlap of discovery in Phase I with Phase II, particularly relating to allocation issues, but agree to avoid duplication of discovery between the phases. The

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parties anticipate needing at least the number of depositions and interrogatories set forth in the court's Differentiated Case Management Plan for complex litigation, but reserve the right to seek the approval of the court to amend any discovery limitations, if determined by the parties to be necessary due to complexity of the case. The parties do not anticipate time limits on depositions or limitations on scope of discovery pending resolution of dispositive motions at this time.

The parties' discovery during Phase I shall be conducted to elucidate facts and information related to respective claims of liability of the Defendant and Third-Party Defendants at the Site pursuant to CERCLA, NREPA and other pendent state claims.

10. Motions:

The parties anticipate filing motions for full or partial summary judgment on Phase I issues, Defendant's and Third-Parties' alleged liability for response costs under CERCLA, NREPA and pendent state claims, by May 24, 1998, ⁹ sixty (60) days following the discovery cut-off date.

Non-dispositive motions. The parties acknowledge that it is the policy of this court to prohibit the consideration of non-dispositive motions unless accompanied by a certification that

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the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

11. Alternative Dispute Resolution:

The parties do not recommend that this case be submitted to alternative dispute resolution at this time, but reserve the right to reconsider use of alternative dispute resolution, as to certain issues, at a later time. However, the parties agree that an early informal settlement conference supervised by Magistrate Judge Joseph G. Scoville and scheduled within sixty (60) days following the June 24, 1998 scheduling conference, may be desirable.

12. Length of Trial:

The parties agree that the length of trial be determined by the Court, with recommendations from the parties, at the Rule 16 scheduling conference following determination by the Court of summary judgment motions as to liability in Phase I of this action.

13. Prospects of Settlement:

The United States and Albion conducted pre-filing settlement negotiations during July - December 1997 without success. Pre-

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filing settlement negotiations between the United States and Decker resulted in the Consent Decree lodged with the Court on May 14, 1998, that is currently in a public comment period pursuant to terms of the Consent Decree and Department of Justice policy at 28 U.S.C. § 50.7. [See 63 Fed. Reg. 29752 (June 1, 1998)].

14. Track Assignment:

The parties recommend that this matter be assigned to the Complex Litigation Track, identified as Track #IV, in the court's Differentiated Case Management Plan.

Respectfully submitted,

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DATE: June 10, 1998

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MESSAGE: Re: United States v. City of Albion, Michigan, et al.,
Civil No. 1:97CV1037 (W.D. Mich.) -
Draft Joint Status Report